STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL R. BYRNES,

Plaintiff-Appellant,

v

CHARLES G. DONNELLY,

Defendant-Appellee,

and

JOSEPH SOLOMON SPUHLER,

Defendant.

UNPUBLISHED
June 18, 1999

No. 209783
Kalamazoo Circuit Court
LC No. 97-001886 NO

Before: Bandstra, C.J., and Hoekstra and R. B. Burns*, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's grant of summary disposition in favor of defendant Donnelly. We affirm.

Plaintiff was visiting a dorm room on the campus of Western Michigan University ("WMU") when defendant Spuhler attacked him without provocation. Defendant Spuhler attended WMU on a football scholarship and had previously assaulted two other people on campus. Defendant Donnelly served as the associate dean of judicial affairs at WMU. Plaintiff, who was not a student at WMU, essentially argues that Donnelly could have prevented this attack by properly disciplining Spuhler after the first two assaults.

The trial court granted defendant Donnelly's motion for summary disposition under MCR 2.116(C)(7) and (8). We review a trial court's grant of summary disposition de novo, *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

I

Plaintiff first argues that Donnelly had a duty to protect him because Donnelly had a special relationship with defendant Spuhler. We disagree. Absent a special relationship or set of circumstances, a person has no duty to aid or protect someone else from a third person's conduct. *Murdock v Higgins*, 454 Mich 46, 54; 559 NW2d 639 (1997). See also *Hakari v Ski Brule, Inc*, 230 Mich App 352, 360-361; 584 NW2d 345 (1998). Plaintiff argues that Donnelly, as dean of judicial affairs, knew or should have known that Spuhler's violent tendencies posed a risk to non-student visitors at WMU. According to plaintiff, this knowledge, coupled with Donnelly's disciplinary authority, formed the basis for a special relationship between Donnelly and Spuhler, which gave rise to Donnelly's duty to protect plaintiff by suspending or expelling Spuhler. We find plaintiff's argument disingenuous. Michigan courts have not recognized a special relationship between a student on an athletic scholarship and an associate dean of student judicial affairs, and the case law on special relationships makes clear one does not exist here.

Plaintiff cites several cases to support his argument that Donnelly had a special relationship with Spuhler. For example, he cites *Marcelletti v Bathani*, 198 Mich App 655, 664; 500 NW2d 124 (1993), for the proposition one might have a duty to protect someone who is endangered by a third-party's conduct if one has a special relationship with that third-party.[1] Although *Marcelletti* certainly stands for this principle, it also stands for the principle that "the Court will impose a special relationship only where a person's actions directly influence another." *Id*. at 665. Furthermore, the basis for imposing that duty is one's control over the third-party. *Id*. at 664. The *Marcelletti* panel listed the following special relationships that might generate such a duty: landlord-tenant, proprietor-patron, employer-employee, residential invitor-invitee, psychiatrist-patient, doctor-patient, carrier-passenger, and innkeeper-guest. *Id*. at 664. However, there was no serious allegation of control in this case, and we do not find a dean's relationship to a scholarship athlete at a university to be analogous to the examples listed in *Marcelletti*. Plaintiff has cited *Marcelletti* and other cases that appear to support his claim of a special relationship; however, when the passages from each of the cases he cites are read in context, it becomes clear that those cases actually support defendant's argument that Donnelly had no special relationship with Spuhler.[2]

Because plaintiff failed to allege facts sufficient to satisfy the special-relationship exception, he failed to establish that defendant had a duty to protect him. Consequently, plaintiff failed to state a claim on which relief can be granted and summary disposition pursuant to MCR 2.116(C)(8) was appropriate. *Gazette v City of Pontiac (On Remand)*, 221 Mich App 579, 584; 561 NW2d 879 (1997).

II

Assuming arguendo that plaintiff could show that Donnelly's relationship with Spuhler gave rise to some sort of duty, plaintiff's claim also fails under Michigan's public-duty doctrine. The doctrine provides:

> "[t]hat if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages." [*White v Beasley*, 453 Mich 308, 316; 552 NW2d 1 (1996), quoting 2 Cooley, Torts (4th ed), § 300, pp 385-386.]

The rule that a public official is regarded as owing his or her duty to the public in general and not to a specific individual applies "unless a special relationship exists between the official and the individual such that performance by the official would affect the individual in a manner different in kind from the way performance would affect the public." *Koenig v South Haven*, 221 Mich App 711, 730; 562 NW2d 509 (1997); *Harrison v Director of Dep't of Corrections*, 194 Mich App 446, 456-460; 487 NW2d 799 (1992). As to the establishment of a special relationship between a victim and a governmental agency, some contact between the two and justifiable reliance by the victim on the promises or actions of the agency is required. *Id*. at 459. In the instant case, both parties agree that defendant is a public official for purposes of this lawsuit. Again, assuming arguendo that he had some duty to protect the public from Spuhler's vicious misconduct, defendant owed that duty to the public at large. Notwithstanding the questionable logic and public policy implications involved in holding a university dean responsible for an assault committed by a university student on a non-student visitor, the scope of that hypothetical duty bars plaintiff's recovery here. Simply put, plaintiff cannot recover even if defendant breached his duty, because defendant would have owed the duty to the general public. Thus, summary disposition was appropriate on the basis of the public-duty doctrine.

In his response brief, plaintiff argues that we should not address this argument because "the trial court did not make any ruling whatsoever regarding the applicability, if any of the public duty doctrine" (Plaintiff's reply brief, p 4). However, the trial transcript belies plaintiff's assertion. In stating its reasons for granting defendant's motion, the trial court noted:

> "Under the Public Duty Doctrine public official's duty is to the public, at large, and not a single person.
>
> Based upon what we have here, and the standards I've recited, it's the Court's opinion that summary disposition is proper under (C)(7), because of governmental immunity, and the fact that there's no particular duty to be found between Mr. Donnelly and the Plaintiff." (Trial Transcript, 11/10/97, p 12).

Plaintiff simply ignores this argument in his appellate brief, despite the fact that defendant raised it in his brief in support of his motion for summary disposition and the trial court referenced it when announcing its ruling. He also failed to address the substance of the argument in his reply brief, even after defendant included an extensive analysis of this dispositive issue in his brief on appeal. While plaintiff's claim fails for several reasons, the public-duty doctrine, by itself, disposes of this case. Plaintiff's refusal to address such an obvious weakness evinces a troubling lack of candor with this Court.

III

The trial court also granted summary disposition on the basis of governmental immunity under MCR 2.116(C)(7), as provided in Michigan's governmental immunity act, MCL 691.1407(2); MSA 3.996(107)(2). If reasonable minds cannot differ with respect to whether the defendant's actions amounted to gross negligence, and defendant is entitled to governmental immunity, then summary disposition is appropriate. *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992). Even assuming Donnelly had a duty to discipline Spuhler, his governmental immunity shields him from liability, unless his conduct is grossly negligent. Gross negligence requires conduct "so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). If, as a matter of law, Donnelly's conduct was not grossly negligent, he is entitled to summary disposition. Although reasonable minds might differ over whether Donnelly's failure to act constituted ordinary negligence, the statutory standard is *gross negligence*. Based on the alleged facts, reasonable minds could not conclude that Donnelly's actions were grossly negligent; therefore, summary disposition was appropriate under MCR 2.116(C)(7).

IV

We conclude that defendant is entitled to costs. In accordance with defendant's request, we are awarding him costs and actual attorney fees incurred in defending against plaintiff's appeal. In light of the authority cited above, and plaintiff's failure even to address the public-duty doctrine, we hold that plaintiff's appeal is vexatious because it is without any reasonable basis for belief that there was a meritorious issue to be determined on appeal. MCR 7.216(C)(1)(a). See also *Resteiner v Strum, Rugged & Co, Inc*, 223 Mich App 374, 377; 566 NW2d 53 (1997). Pursuant to MCR 7.216(C)(2), we remand to the trial court for a determination of actual damages.

Affirmed, but remanded for a determination of actual damages. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra
/s/ Robert B. Burns

[1] The case also stands for the proposition that one can have a duty to protect someone from a third party when one has a special relationship with the injured party. *Marcelletti, supra*. However, plaintiff acknowledges that he had no relationship with Donnelly.

[2] Plaintiff cites several additional cases, but we note that in none of them has this Court imposed a duty on the defendant to protect the plaintiff from injury by a third party. Plaintiff simply states the general rule from those cases and ignores its application. See *Buczkowski v McKay*, 441 Mich 96; 490 NW2d 330 (1992) (retailer not liable for selling ammunition to intoxicated third-party who used it to wound the plaintiff), *Harrison v Dept of Corrections*, 194 Mich App 446; 487 NW2d 799 (1992) (there was no special relationship between defendants and parolee who injured plaintiff), *Chivas v*

Koehler, 182 Mich App 467, 475; 453 NW2d 264 (1990) (no special relationship existed between the prison guards and the escaped inmates who injured plaintiff), and *Massey v Department of Corrections*, 182 Mich App 238; 451 NW2d 869 (a public duty is owed to a specific individual only when performance would affect the individual in a manner different in kind from the way performance would affect the public).

Plaintiff also cites *Hinkelman v Borgess Medical Center*, 157 Mich App 314; 403 NW2d 547 (1987) (a psychiatrist's duty to control a dangerous patient is premised upon the psychiatrist's control over that patient). In *Hinkelman*, we recognized that "a psychiatrist owes a duty to use reasonable care to protect persons endangered by his patient." *Id*. at 321. However, that duty and liability is "premised upon the psychiatrist's control over a dangerous patient…." *Id*. That is, the special relationship between psychiatrist and patient "imposes a duty upon psychiatrists to protect *readily identifiable persons from the dangers posed by patients.*" *Id*. at 321-322 (emphasis not in original). The differences in the relationships between a psychiatrist and his patient and a student and his dean are so extreme as to not even warrant discussion. See *Id*. at 322-325. There is no such relationship here, and we find plaintiff's failure to mention these facts or attempt to distinguish this case to be less than fully candid. Further, we cannot see how plaintiff can be considered a readily identifiable person. As seen in the other cases plaintiff cites, duties to the general public do not establish the liability he alleges here.